

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANIEL D. LANING)	
Claimant)	
VS.)	
)	
DEFFENBAUGH DISPOSAL)	Docket No. 214,997
Respondent)	
AND)	
)	
HARTFORD ACCIDENT & INDEMNITY)	
Insurance Carrier)	

ORDER

Respondent appeals from a preliminary hearing Order entered by Administrative Law Judge Steven J. Howard on February 14, 1997.

ISSUES

In the appealed Order, the Administrative Law Judge required respondent to pay temporary total disability benefits and medical treatment by R. Bradley Reeves, M.D., including surgery. Respondent contends that the claimant has failed to establish that he sustained an occupational injury arising out of and in the course of his employment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Order by the Administrative Law Judge should be affirmed.

The evidence establishes that after going to work on a permanent basis for respondent in May 1996 claimant dislocated his shoulder in late July of 1996. The evidence also establishes that before going to work for respondent claimant suffered from a chronic instability of his shoulder and had dislocated his shoulder on several occasions.

After the injury at issue in this case, claimant was referred to R. Bradley Reeves, M.D. Dr. Reeves recommended surgery but indicated claimant needed surgery before he was employed by respondent. On the basis of Dr. Reeves' opinion, respondent argues that it

should be responsible for, at most, treatment for a temporary aggravation but not for the recommended surgery.

Although respondent makes a strong argument and the circumstances do not, as we find them, fit neatly into generally accepted principles, the Appeals Board disagrees with respondent's argument and concludes the order should be affirmed. The evidence does establish that claimant had preexisting chronic instability of his shoulder. He had, before going to work for respondent, been treated by, among others, Dr. Page. According to claimant, Dr. Page told him there was an 80 percent chance he would need surgery but that he might avoid surgery if he did certain exercises. Claimant testified that he did the exercises and it helped. He was able to perform his duties in his employment for respondent prior to the incident of July 29, 1996. As we understand the record, surgery had not been recommended prior to the July 29, 1996, incident. It had been predicted but not recommended. We note that Dr. James Armstrong's records contain a suggestion that claimant may have been referred to Dr. Page for surgery. However, the March 2, 1995, written order referring claimant to Dr. Page states: "Refer to Dr. Page for ? corrective surgery." The record suggests that he was referred to determine whether surgery should be performed. This would be consistent with claimant's testimony.

Finally, the Appeals Board notes that Dr. Reeves, while he does state that he would have recommended surgery before claimant's employment for respondent, also states that in his opinion each separate dislocation probably caused further injury and damage to the joint. This would include the incident at work. On balance we find that the incident of July 29, 1996, when claimant dislocated his shoulder in the course of his employment for respondent, caused additional injury and triggered claimant's need for surgery. As we understand the evidence, claimant's previous treating physician had indicated that surgery probably would be necessary but had not recommended it. While Dr. Reeves might have recommended surgery earlier, he was not then treating the claimant.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order by Administrative Law Judge Steven J. Howard dated February 14, 1997, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

c: Patrick C. Smith, Pittsburg, KS
Steven C. Alberg, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director